

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 259 of 1998
with
CRIMINAL REVISION APPLICATION No. 313 of 1998

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?
1 to 5 : NO

GURMEET KAUR BATRA

Versus

STATE OF GUJARAT

Appearance:

MR AH MEHTA for Applicant
MR SR DIVETIA APP for Respondent No. 1
MR SR GUPTA for Respondent No. 2

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 27/07/98

ORAL JUDGEMENT

Heard learned advocate Mr. A.H Mehta for applicant in both these applications and Mr. S.R Gupta, the learned advocate for respondent No.2 and Mr. S.R Divetia, the learned APP for respondent No. 1 - State.

2. Both these applications arise out of the applications for discharge made by the applicant under Section 245 (2) CrPC in Criminal case No. 3975 of 1996 and Criminal Case No. 465 of 1997 respectively. Both the applications made by the applicant herein were dismissed by the learned Metropolitan Magistrate under his orders dated 18th April, 1998. Feeling aggrieved, the applicant has preferred above two revision applications under Section 397 read with Section 401 CrPC. The brief facts leading to the present applications are :-

2.1 The applicant at the relevant time was one of the Directors of a Company named and styled as "Rajendra Pipes Limited." The company had borrowed a loan of Rs. 99,73,500/- from the complainant finance company, which is a Government Company. The borrower company had agreed to repay the said amount of loan in 60 equal instalments of Rs. 2,64,463/- each. The complainant Company had issued a Demand Draft for a sum of Rs. 99,73,500/- on 10th August, 1994 in favour of one R.M Machines Private Limited towards the payment of plant and machinery purchased by the borrower-Company from said R.M Machines Private Limited. On 1st August, 1994, the borrower Company issued 60 post-dated cheques each for Rs. 2,64,463/- to ensure repayment of the loan money and the interest. The said cheques were post dated and were made payable on 8th April, 1996 onwards. The five cheques issued by the borrower company bearing Number 665773 to 665777 due and payable on 8th April, 1996, 8th May, 1996, 8th June, 1996, 8th July, 1996 and 8th August, 1996 respectively were dishonoured, for want of sufficient funds, by the drawee Bank. Similarly, Cheque No. 665778, due and payable on 8th September, 1996, was dishonoured by the Bank. The borrower Company thus having made default in making repayment of the loan money and the cheques issued by the said Company having been dishonoured by the Banker for want of sufficient funds, the above referred complaints came to be lodged against the Borrower-Company and three of its Directors including the present applicant, for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 {hereinafter referred to as "the Act"}. It appears that the said complaints were lodged after giving due notice to the borrower-Company and its Directors and after giving them an opportunity to make payment of the said amount.

The applicant filed applications for discharge under Section 245 (2) CrPC on the ground that the applicant had resigned as a Director of the

borrower-Company and she had ceased to be the Director of the Company since 27th February, 1995. Thus, on the date of presentation of the cheques to the Banker and the dishonour of the said cheques by the Banker, the applicant was not one of the Directors of the borrower Company and she could not have been made liable for payment of the said cheque amount and no criminal act can be attributed to her. The learned Magistrate has dismissed the said applications, as aforesaid.

Mr. Mehta has appeared for the applicant and has submitted that the disputed cheques were made payable in the year 1996 and if at all any offence has been committed under Section 138 of the Act, on account of Bank dishonouring the said cheques, the applicant not being one of the Directors of the Company, cannot be said to have committed any offence punishable under Section 138 of the Act. Thus, no case has been made out against the applicant, and therefore, applicant deserves discharge. In support of his argument, he has relied upon a copy of Form No. 32 issued by the Registrar of Companies recording change of Directors {Annexure "D" to the petition}. He has also relied upon the judgment of the Supreme Court in the matter of Anil Kumar Sawhney v. Gulshan Rai (1994 Company Cases 150). Relying on the said judgment, Mr. Mehta has submitted that the post-dated cheque is nothing but a Bill of Exchange and it does not become cheque till the date, it is made payable. Admittedly, the disputed cheques were made payable in the month of April, 1996, and thereafter when the applicant was no longer a Director of the Company. Thus, the applicant cannot be made criminally liable for dishonour of the said cheques.

Mr. Gupta has contested these applications and has submitted that it is undisputed that the said cheques were drawn on 1st August, 1994 when the applicant was one of the Directors of the borrower-Company. He has further submitted that even if the applicant has ceased to be the Director of the borrower-Company, she shall have to prove the same in the course of trial and no order of discharge can be made at this stage. He has further submitted that even if it is presumed that the applicant has ceased to be the Director of the borrower-Company, she could still be a person responsible to the Company for the conduct of the business of the Company and if that be so, under Section 141 of the Act, she would still be liable to be tried for offence punishable under Section 138 of the Act. In support of his arguments, he has relied upon a Supreme Court judgment in the matter of Modi Cements Limited v. Kuchil Kumar Nandi, [(1998) 3 SCC 249] and

the judgment of this Court in the matter of Dipendra G. Choksi & Anr. v. Dipak Chimanlal Patel, {1997 (2) GLR 1191}. He has also relied upon the averments made in para 6 of the complaint. He has submitted that in view of averments made in the complaint, a prima facie case has been made out against the present applicant and she cannot be discharged at this stage.

In the matter of Anil Kumar Sawhney {Supra}, the Court was concerned about the liability of a Drawer of the post-dated cheque, which is presented to the Banker after expiry of six months from the date it was drawn. The Court has taken the view that a post-dated cheque is nothing but a bill of exchange when it is written or drawn, and it becomes a "cheque" when it is made payable on demand. And if such a cheque is presented to the Banker within six months or during the period of its validity whichever be the earlier, from the date it is made payable, and if it is dishonoured for the reasons stated, in the said section, the offence under Section 138 of the Act would be constituted. In the matter of Modi Cements {Supra}, the Court has held that. "...The Court taking cognizance of the complaint under Section 138 of the Act is required to be satisfied as to whether a prima facie case is made out under the said provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial. A petition under Section 482 CrPC is tenable when no offence even prima facie was made out in the complaint. But the application thereof will depend upon the averments made in the complaint." Mr. Mehta has submitted that on the facts of the present case, the said judgment has no applicability, more particularly the question of presumption under Section 139 does not arise since this is an application wherein applicant does not dispute that the complainant-Company is a holder in due course. In the matter of Dipendra G. Chokshi & Anr. {Supra}, considering the application for quashing of a complaint for offence punishable under Section 138 of the Act, in paragraph 6 of the judgment, the Court held that, "... Whenever any complaint is filed merely and only for the alleged offence under Section 138 of the Act then even it is the foremost duty of the learned Magistrate to carefully screen and examine each and every allegation in the complaint and if there is/are a manifest circumstances prima facie constituting an offence of cheating under I.P Code, then while taking cognizance and issuing the process he should see to it that it is not confined only to Section 138 of the Act but shall also issue process under Section 420 of the I.P Code as well." Mr. Gupta has submitted that in the present case also,

the complainant Company at the time of framing of charge can as well request the Court to frame charge for offence punishable under Sections 406 and 420 of the I.P Code, and therefore also, the applications for discharge made by the present applicant deserve to be dismissed.

In the present case, from the facts revealed in the complaint it does appear that the borrower Company had borrowed loan from the Complainant-Company and had assured repayment thereof in 60 equal instalments and had also issued post-dated cheques for satisfying the said debt. Six of the said cheques had been presented to the Bank on which they were drawn and have been dishonoured for want of sufficient funds. It is not disputed that the said cheques were drawn on 1st August, 1994 and at that time the petitioner was one of the Directors of the Borrower Company. In view of the facts of the present case, the reliance placed on the case of Anil Sawhney (Supra) is uncalled for. As discussed hereinabove in the said case, the Court was concerned whether the post-dated cheque presented to the banker can be said to have been presented within six months as stipulated under Section 138 of the Act. That being not the case here, the said judgment cannot be pressed into service. The question here would be whether the applicant can be held responsible even though she has ceased to be the Director of the borrower-Company because the cheques were drawn on the date when she was admittedly one of the Directors of the Company. Whether she can be said to be a person incharge of or responsible to the Company for the conduct of business of the Company is also required to be considered. In my view, the applicant therefore cannot be discharged of the criminal charge at this stage. The applications for discharge made by the applicant have rightly been dismissed by the learned Magistrate.

Both these applications are therefore dismissed. Rule nisi issued on Criminal Revision Application No. 259 of 1998 is discharged. Interim relief is vacated. Notice issued on Criminal Revision Application No. 313 of 1998 is also discharged. The parties shall bear their own costs.

Prakash*